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A CONSERVATIVE PERSPECTIVE ON THE FUTURE OF THE AMERICAN JURY TRIAL

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INTRODUCTION

I want to defend here an essentially conservative vision of the American jury trial. This Essay is written in the spirit of the key conservative insight—how much effort it takes to keep things from getting worse. My conviction is that the American jury trial, as we have developed it, is one of the greatest achievements of American public culture. It is a mature institution surrounded by a constellation of rules and practices that are ideally suited to accomplish what for us is justice in tens of thousands of situations every year. It succeeds because of the almost unbearable tension of opposites that it creates. It should be understood and appreciated before it is "reformed."

Many of the proposed reforms of the jury trial are consistent with a narrow understanding of the place of the jury trial in American public life that I call the "received view" of the trial. Some such reforms are fair enough, but often do not go to the heart of the matter. Once one appreciates the subtlety and depth of which the American trial is now capable, proposing reforms becomes a much more challenging task. I will very tentatively offer a few possibilities. I will also sketch out the structural and intellectual bases of the ongoing pressure on the American trial. I am unsure about the extent to which they will prevail in the ensuing decades. Because I believe that there are few public inevitabilities, that political imagination and will can resist strong pressures, I believe that, on the matter of the future of the American jury trial, pessimists are cowards and optimists are fools.

First, a theoretical point. I will argue here that the assumptions about the nature of the American jury trial that animate at least some reformers are wrong. What does it mean for an assumption about a set of public practices and institutions to be "wrong?" One can show

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that they are inconsistent with much of what we do and have done, practices that are appropriate candidates for what philosopher John Rawls calls "considered judgments" of justice,[1] institutionalized judgments made under favorable conditions in which those who are best suited to know have a high level of confidence. The conservative insight suggests that we ought to be wary of the spirit of abstraction, an ideological temper that reduces complex and subtle practices to one or two simple ideas. But that is not the end of the matter. The very possibility of reform of public institutions, including those that Rawls proposes, assumes the possibility that what we actually do may be inconsistent with the ideals that should control and structure those institutions. The relationship between practices and ideals is a circular one, in which each may be refined by comparison with the other, to arrive at a position that Rawls calls "reflective equilibrium," the position in which there is at least temporary peace between practices and ideals. This calls for political judgment of a form that parallels on the level of institutions the kind of judgment that the trial itself is often able to achieve at the level of individual cases. A position on what the trial *should* be can only be justified by "the mutual support of many considerations, of everything fitting together into one coherent view."[2] After our more theoretical self-understandings are tutored by our practices, and those practices reconsidered in light of our understandings, we are in a position to give the best interpretation of the American trial. As Clifford Geertz consistently maintained, it is by cycling between the most detailed descriptions of institutionalized practices and the broadest generalizations that we are likely to achieve real insight into both those practices and our more general ideas.[3] The task of understanding the trial is an interpretive task and it "is partly evaluative, since it consists in the identification of the principles which both best 'fit' or cohere with the settled law *and legal practices* of a legal system *and also provide the best moral justification for them*, thus showing the law 'in its best light.'"[4]

1. JOHN RAWLS, A THEORY OF JUSTICE 47 (1971).

2. *Id.* at 579.

3. Clifford Geertz, *From the Native's Point of View: On the Nature of Anthropological Understanding*, *in* INTERPRETIVE SOCIAL SCIENCE 239 (Paul Rabinow & William M. Sullivan eds., 1979).

4. H.L.A. HART, THE CONCEPT OF LAW 239–41 (2d ed. 1994) (emphasis added) (quoting RONALD M. DWORKIN, LAW'S EMPIRE 90 (1986)) (describing Dworkin's jurisprudential method).

I. THE RECEIVED VIEW OF THE TRIAL

What I call the "received view" of the trial understands it exclusively as the institutionalized device for the maintenance of the rule of law in situations where there are disputes of fact. The rule of law is understood in Justice Scalia's sense as a "law of rules,"[5] pre-existent commands that assign determinate consequences to determinate classes of events. The primary political good of law so conceived is the enhancement of citizen autonomy—the citizen always knows where the lines are and can always control how he may avoid the intrusion of the coercive power of the state into his pursuit of happiness. This is an important political value. Furthermore, it explains and can be brought into reflective equilibrium with a range of actual trial practices.

Speaking broadly, the received view understands the jury to be engaged in two practices, distinct from one another and in sequence. First, it must create from inevitably circumstantial evidence, through the mediation of purely empirical common-sense generalizations, an accurate and value-free narrative of what occurred. It must be accurate, because the rule of law will not prevail if citizens are punished or otherwise suffer the effects of the coercive power of the state when they have not *in fact* done what they are "accused" of doing. This would be true whether the officials deliberately misrepresent the underlying facts or whether they were simply incapable of determining what actually occurred. The account not only must be accurate, but also must be value-free. If the account of what occurred was infected by norms that came from the jury's normative common sense or sensibility, then there would not be assurance that the case was actually being decided based exclusively on the legitimate norms found in the jury instructions.

After constructing a value-free account of what occurred, the jury must perform what we can call an act of fair characterization. The jury must decide whether or not the factual account that it has constructed, with the help of counsel, from the circumstantial evidence falls within or without the classes defined by the rules to be found in the jury instructions that reflect the elements of the claims, crimes, or defenses. The closer this operation comes to a deduction the better, and this notion is

5. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

> often thought to imply, further, that there are rules and procedures of inference according to which the features of the various concepts and the characteristics of various particular things are juxtaposed to one another so that certain features can be said to correspond to certain characteristics and not to others.[6]

Finally, the verdict occurs as the result of what we might call an act of conceptual "inspection," by which the jury determines whether or not it has categorized the value-free account of what has occurred within the classes defined by the instructions. Thus, in the received view of the trial, the only rules or concepts linking the facts of the individual case and the verdict are the value-free empirical generalizations that allow the construction of the value-free account and the legitimate legal categories on the other.

The power of the received view stems not only from its connection with basic values of the liberal state, but also from its coherence with a range of the most distinctive features of the American trial. It is consistent with the availability of a range of summary procedures in civil cases (though not with the absence of most of those procedures in criminal cases), the doctrine of materiality in evidence law, a whole range of other evidentiary doctrines that seek to ensure reliability, the availability of judgments as a matter of law after trial (though, again, not against the defendant in criminal cases), the use of jury instructions, and the strong preference for testimony in the language of perception. The law of rules has an important place in the structure of American trial practices. I will argue below, however, that to understand the American trial solely in these terms is to commit the fallacy of misplaced concreteness, to assume that important rules or aspects of the trial exhaust its concrete reality. To understand the trial solely in the language of the received view is to impoverish our interpretation of the trial. To act as if the trial were equivalent to the rules and practices that stem from this understanding would be to return at the trial level to a species of mechanical jurisprudence.

Many suggestions for reform of the American jury trial are attempts to shore up this vision of the trial. For example, there have been suggestions and actual steps taken to expand the use of summary disposition,[7] to read the jury instructions at the beginning of the

6. PETER J. STEINBERGER, THE CONCEPT OF POLITICAL JUDGMENT 92 (1993).

7. Judge Patricia Wald has warned of the danger of the impoverishment of legal discourse through overuse of the summary judgment device:

> And one must at least think about the implications of the new regime, in which law is mostly made on the basis of undisputed facts "pleaded," "stipulated," or "inferred" rather than on fuller trial records that may more accurately represent the complexity

trial, to rewrite the instructions so that they are more comprehensible,[8] to limit what lawyers may say in opening statement, and to enhance the judge's "gatekeeper" function for scientific and nonscientific expert testimony.[9] Some of these suggestions and developments are benign, but others pose a threat to deeper levels of the trial which are essential if it is to remain, as it ought to, "the central institution of law as we know it."[10] To understand why, I need to sketch out this fuller understanding of the trial.

II. A LINGUISTIC PHENOMENOLOGY OF TRIAL PRACTICES

I have argued recently that the trial is for us a central practice brilliantly adapted to our political situation.[11] To understand this, it is necessary actually to see what we are doing at trial, to examine the complex of constitutive rules and practices that the trial comprises. What the trial does, and what the rules of the trial help it to do, is to actualize the common sense of the jury under the "discipline of the evidence"[12] to make a practical decision. Those rules and practices give the jury access to moral, political, and legal sources. Ultimately, the jury must make a choice about what dimension of the case is the most important. But that decision is not made en grosse or abstractly. Indeed, it is the nature of decent society to deny that such a practical decision could ever be made in the same way for all situations.

In preparing for trial, lawyers seek to identify a legal theory of the case, a factual theory of the case, and a theme, or persuasive theory of the case. The legal theory will allow the attorney to resist a

> and ambiguity of life. Will our law be less sensitive to the multivalenced and perspectival qualities of human events? Will our jurisprudence craft rules and principles and hand them down fully formed from the netherworld of law school hypotheticals, instead of forging them in the heat of pitched battle and hammering them into shape on the anvil of trials, witnesses, cross-examinations, and live evidence evaluated by ordinary lay persons?
>
> If Oliver Wendell Holmes was right when he said that "[t]he life of the law has not been logic: it has been experience," then the decoupling of law from experience could strike a mortal blow to its integrity; our law would not disappear, but could become lifeless, like a whale washed up on the beach.

Patricia Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1942, 1944 (1998) (citation omitted).

8. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1374 (1979).

9. *See, e.g.*, FED. R. EVID. 702, 703; Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

10. JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE 108 (1999).

11. ROBERT P. BURNS, A THEORY OF THE TRIAL (1999).

12. JEFFERY ABRAMSON, WE, THE JURY 162 (1994)

motion for a directed verdict and provide some benchmark for determinations of materiality throughout the trial. It will provide argumentative resources in closing argument based on the jury instructions. In some cases, perhaps cases where there was a significant reliance interest, a lawyer will be able to argue persuasively that the most important aspect of the case is the enforcement of the clear legal rules. But the legal rules provide only one helix in what is a double helix of norms out of which the lawyer builds her case. The other helix is constituted by the interrelation of theme and theory of the case. The theme is the moral-political claim the case makes on the jury's sensibilities. In an earlier idiom, it suggests to the jury what is "true law," that is, the interpretation and application of law *in the dense complexity of this particular factual situation* that best expresses the moral sensibilities of the community. In the language of the interpretive turn in jurisprudence, it tells the jury what they should see this case "as." When lawyers in opening statements begin by saying, "This is a case about . . . ," they are seeking the inspired simplification that will ring true throughout the case and so win the battle for the jury's imagination. This theme will be found explicitly in the narrative of opening statements and then implicitly throughout the trial. The first rule of trial procedure with regard to opening statements is that lawyers may not "argue." But a good opening statement will always contain an "argument" in the same way that a novel or a short story contains an argument. It is carried by the descriptions, inclusions, exclusions, and sequencing of the narrative. The significance of these choices can never be exhausted by their relationships to the rules in the jury instructions.[13] The openness of the narrative of opening statements to reference to all of the moral resources of the culture helps keep the law from ossifying into an artificial bureaucratic instrument for the assertion of state power.

The law of professional responsibility mandates that the client set the objectives of the representation.[14] However, the same law

13. GEORGE STEINER, REAL PRESENCES 82–83 (1989):

> A sentence always means more. Even a single word, within the weave of incommensurable connotation, can, and usually does. The informing matrix or context of even a rudimentary, literal proposition—and just what does *literal* mean?—moves outward from specific utterance or notation in every-widening concentric and overlapping circles. These comprise the individual, subconsciously quickened language habits and associative field-mappings of the particular speaker or writer. . . . No formalization is of an order adequate to the semantic mass and motion of a culture, to the wealth of denotation, connotation, implicit reference, elision, and tonal register which envelop saying what one means, meaning what one says or neither.

14. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2001).

provides that a lawyer may not allude to matter at trial, including during opening statement, of which there will not be admissible evidence.[15] Thus, the story that the lawyer tells is the one that accomplishes the client's objectives, but is limited and mediated by factual truth, those things that cannot be changed at will, and by the law of rules as expressed in the doctrine of materiality. As John Dewey put it approvingly, the lawyer in developing his theme and factual theory of the case follows an "experimental and flexible logic" that is "relative to consequences rather than to antecedents."[16] (That the lawyers for the parties tell these stories assures that there will not be "One Big Story" decided upon by a state official.) But those consequences are not merely client wishes, they are wishes that have been brought into some equilibrium with the written law, the common sense, and the public identity of the jury. It is an "equilibrium" because the client's objectives will change in and through the process of counseling in the long shadow of the anticipated trial, and the case presented by the lawyer will be designed to show that the client's objectives are morally, legally, and politically consistent with those multiple sources of norms.[17]

Opening statements are expressions of "trial diplomacy." As such they are determined by the multiple and often incommensurable norms of their audiences. And, of course, there are two opening statements. The doubling of opening statements dramatizes the inevitable gap between the truth and the telling of it. That doubling prepares the jury for the major part of the trial, the presentation of evidence. The bulk of the evidence comes through the testimony of witnesses who will generally not be diplomats. They will tell their stories as they remember them, memories inevitably shaped by their own personal interpretations of what occurred. The basic rules of

14. *Id.* R. 3.4(e).

16. John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 26–27 (1924).

17. As one philosopher put it:

> Drawn into public life by personal need, fear, ambition, and interest, we are there forced to acknowledge the power of others and appeal to their standards. We are forced to find or create a common language of purposes and aspirations, not merely to clothe our private outlook in public disguise, but to become aware ourselves of its public meaning. We are forced, as Joseph Tussman has put it, to transform "I want" into "I am entitled to," a claim that becomes negotiable by public standards. In the process we learn to think about the standards themselves, about our stake in the existence of standards, or justice, or our community, even of our opponents and enemies in the community; so that afterwards we are changed.

Hanna Fenichel Pitkin, *Justice: On Relating Private and Public*, *in* HANNAH ARENDT, CRITICAL ESSAYS 261, 282 (Louis P. Hinchman & Sandra K. Hinchman eds., 1994).

direct examination exaggerate this productive discontinuity between opening statements and witness testimony. Witnesses must testify on direct examination in response to nonleading questions and in the language of perception. They will be choosing the words in which to testify, something that reveals who they are in a way that so-called "character evidence" would rarely approach. More importantly, this discontinuity between openings and testimony in even the best-prepared case tells the jury that their task will require real judgment, that the relationship between the norms they embrace and the facts of the individual case are as yet unclear, that that relationship is worth thinking, even fighting,[18] about. It provides the basis for the clarification of *both* our more general norms and the facts of the individual case.

Cross-examination provides perhaps the clearest example of a central aspect of the trial as a whole. The trial proceeds through the construction and deconstruction of narratives. Narratives contain the potential meanings of events proposed by the parties (in openings) and by witnesses (in direct examination). The deconstructive aspects of the trial break these proposed meanings down—criticize them. Perhaps the philosophical term "critique" is more apt. For the deconstructive aspects of the trial generally suggest that the potential meanings of events proposed in narratives are inapt, inappropriate for the *particular* facts of this particular case. We have already seen that the distinctive narrative style of direct examination already suggests that the proposed interpretations of the opening statements, what the lawyers propose the jury see the case "as" ("This is a case about . . .") are likely to be somewhat overblown and overgeneral. This same critical acid is applied even to the lower-level descriptions in the direct examinations themselves. For cross-examination says implicitly that the direct examinations themselves were interpretations, as indeed they were.[19] Cross-examiners remind the jury of those aspects of the situation that the witness has chosen not to reveal. The assumption underlying cross-examination is that the witness has *chosen* to cut into the great booming, buzzing confusion of life in a way that is consciously or unconsciously willful, that he has left something important out that changes the meaning of everything. The "autopoetic" nature of a consistent and coherent direct examination, the suggestion, indeed the feel, that it tells everything about a subject can

18. *See* STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000).
19. *See* STEVEN LUBET, MODERN TRIAL ADVOCACY 25 (1993).

be undermined by cross-examination. After an effective direct examination the deconstructive shock of a well-wrought cross-examination can be stunning.

There are a number of devices by which the cross-examiner can offer his "critique" of the direct. All cross-examination employs short, clear, undeniable statements that together suggest some inference helpful to the cross-examiner's factual theory, theme, or legal theory. He may retell the story with slight changes of inclusion, description, and ordering that show that the "undisputed" facts can have quite another meaning than the one that was used to construct the direct. Even if the cross-examiner does not have the wherewithal to retell the entire story, he may seek concessions on particular facts and admissions as to the inevitably infinite number of things the witness does not know or did not do that may change the meaning of the events. The cross-examiner may directly suggest other interpretations of the perceptual facts to which the witness testified. He may suggest that the likely consequences of the witness's version of events did not occur and so invoke the valid syllogism: If A, then B. But not B. Therefore not A. The cross-examiner can show the jury how the witness, who is often an important player in the real-world drama that had led up to the trial, does not deal fairly with aspects of the situation that are uncomfortable for him. And, of course, there exists an entire repertoire of impeachment devices that can cause the jury to doubt what may appear to be straightforward reports of past perceptions. In sum, cross-examination serves to break the selectivity, willfulness, and manipulativeness that inheres in almost all storytelling. In the entire context of the trial, it is not wholly destructive. It serves to multiply the perspectives through which the jury sees the case. Although the constitutive rules of the trial elevate the importance of a past event, to an extent that mediators view to be obsessive, still the jury can reach back to that event only through the performances of lawyers and witnesses. When the trial works, it provides an apt lens and metaphor for the events that it represents. Part of that metaphor is provided by the dispositions of witnesses as they perform under the pressure of cross-examination. Jurors come to trust those witnesses who have treated them decently, fairly, and show respect for the important task that the jurors have.

By the time closing argument comes around, each lawyer should know that the simplifications of opening statement, however inspired, are a bit *too* simple. No triable case is perfect, either on the factual or

the normative level. A judgment has to be made and that judgment will require the jury to say what is most important about the case. But the genius of the trial is to prevent the jury from making the case a purely symbolic expression of some abstract commitment. The jury's immersion in the details of the evidence, the "discipline of the evidence," is designed to make that impossible. And so the lawyer in closing arguments must circle between the significance of what occurred and the truth of his factual theory. Both are important. Closing is an appeal to the freedom of the jury because "you cannot persuade jurors to do what they do not want to do. The goal of argument is to help the jury want to do the right thing, to feel comfortable in making the proper judgment."[20] But this freedom is not arbitrariness. It is an act of moral and political self-definition that can be more or less adequate, a better or worse integration of the relevant considerations, including the level of factual certainty, and the facts' relative importance. In the classic words of de Tocqueville, the criminal "jury is, above all, a political institution, and it must be regarded in this light in order to be duly appreciated.... He who punishes the criminal is ... the real master of society."[21]

So much for a very compressed summary of the trial's linguistic practices. Because my contention here is that the trial has evolved into a precisely balanced forum, my argument must be carried by description. Any summary will thus be inadequate and I can only invite the reader to consider more detailed treatments.[22] So far I have summarized in a very compressed way only the constitutive rules of the trial and the linguistic performances that it comprises. But these have to be considered in the context of aspects of the trial that are so basic, so simple, that their extraordinary significance can easily be overlooked. "The aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something—because it is always before one's eyes.) ... [W]e fail to be struck by what, once seen, is most striking and most powerful."[23] First, trial presentation focuses on the concrete, the factual,

20. JAMES W. MCELHANEY, TRIAL NOTEBOOK 499 (2d ed. 1987) (quoting trial lawyer Jack Liber).

21. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293 (Henry Reeve trans., 1945).

22. *See, e.g.*, ABRAMSON, *supra* note 12; BURNS, *supra* note 11; NORMAN J. FINKEL, COMMONSENSE JUSTICE (1995).

23. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 50e, at 129 (G.E.M. Anscombe trans., 1953).

and the multiple. The obsessive focus on *exactly* what took place drives the mind downward, away from lazy abstractions. "[N]o ideas but in things."[24] It tells the jury implicitly that the details are important and that the ordinary modes of moral judgment that are extremely interested in those details are appropriate for the understanding and evaluations of the events being tried. Lawyers are obliged to seek and entitled to receive answers to all relevant questions, however embarrassing or uncomfortable for our dominant or "politically correct" (in the broadest sense) understandings. As the trial proceeds though time, each well-chosen detail can become the key normative perspective though which all the evidence is understood. The time compression that is characteristic of the American jury trial protects the unities of theory and theme from the predations of fading memory. It allows the lawyer to show what cannot be said and provides the conditions for "the cumulations of probabilities . . . too fine to avail separately, too subtle and circuitous to be convertible into syllogisms."[25] The succession of strategic choices that the lawyer has to make as to what gambits to accept, what evidence to engage, tends, as the case progresses, to focus the attention of the jury on just the most difficult and important questions. There is a taut balance at trial between continuous explication of a theory of the case and criticism of that explication. Openings are counterposed; cross follows a continuous direct; parties may not offer their own evidence on cross; defendant's case follows plaintiff's, followed by plaintiff's rebuttal, and sometimes defendant's surrebuttal. We have to understand how a perspective holds together but need to keep a mind open enough to understand that there is another way of understanding the situation. The trial is spoken and heard. It provides a momentary identification with all witnesses, but from a physical distance greater than that of ordinary conversation. It thus provides concretely the conditions for good judgment—sympathy and detachment. It is a dramatic event. It is a lens and metaphor that will allow a lawyer with a good case to be fairer to all the aspects of the evidence in all her performances. The trial's practices can actualize all the range of human feeling in a way that creates the conditions for good judg-

24. WILLIAM CARLOS WILLIAMS, PATTERSON 14 (1951).

25. JOHN HENRY NEWMAN, AN ESSAY IN AID OF A GRAMMAR OF ASSENT 288 (Longmans, Green & Co. 1930) (1870).

ment.[26] Those practices will "ring true" or not in a way that is discernable by powerful tacit powers.

Are these merely assertions? Social science investigators, using a range of different methods, have identified the effects of the trial's rules, linguistic performances, and basic features. Mercifully, broad demographic characteristics of juries do not predict verdicts. Juries are bound by the "discipline of the evidence"[27] which is understood with such subtlety that it overwhelms the usual means of multivariable analysis. The norms implicit in the trial's linguistic performance are central to understanding its results. Juries are aware of the public significance of their role. Deliberation, though significant, is less important than the encounter of the individual juror with the evidence.[28] The trial is the thing.

The trial works because of the almost unbearable tensions that are created by the trial's practices. There are tensions between the roles of the lawyers, witnesses, judge, and jurors. There are, as we have seen, enormous tensions between the cases taken as a whole and among the different trial performances. Narrative is very important at trial, as a carrier of meaning, moral evaluation, and political identity, but the forms of narrative are distinctive. We have already seen the contrast between the narratives of opening and direct examination. But the conditions under which these stories are told pull them toward each other—the openings are not just "the best stories." They have to anticipate the other side's case. They have to anticipate the evidence that will soon be heard. (Otherwise, openings are "broken promises.") They have to be concerned with the law of rules—concretely with the possibility of a directed verdict and with the limitations the doctrine of materiality will impose on the evidence to come. The rules of the trial force the trial's narratives toward each other, toward the facts of the case, and toward the rules.

Those tensions create the conditions under which the jury may discern the meaning of the case, the practical truth of a human situation. They impose a real discipline upon the jury. They eliminate the arbitrariness that often inheres in our ordinary lazy attitudes toward large undifferentiated classes of persons and events. They

26. MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS 390 (1986).

27. ABRAMSON, *supra* note 12, at 162.

28. The initial majority prevails in about 90% of cases. VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 110 (1986); Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 LAW & SOC. INQUIRY 323, 343 (1991).

often achieve through public practices what only a few people can achieve by the refinement of their own moral judgment.[29]

The trial works effectively because it does not assume that all the meaning and so the evaluation of events must be derived from the legal categories. The trial actualizes the common sense of the jury, which provides the central source for determining the meaning of the events tried. Juries are typically instructed that they are to rely on their "common sense gained from . . . experiences in life."[30] That phrase may be given an interpretation that is consistent with the received view, that common sense provides a set of value-free empirical generalizations that allow the jury to construct a value-free narrative of what occurred. It seems to me, however, that an account of events that contained no evaluation other than those that could be rigorously derived from the jury instructions would probably be unintelligible. It certainly is not what the consciously structured hybrid of languages that we find at trial actually provides. The moral sources that are actualized at trial exist in the life world of the jurors. They are the "negotiated truths" that made a certain form of life possible. They are not arbitrary and a decision derived from them, duly actualized and refined, is not arbitrary. Least of all is it "purely emotional." I will summarize below the arguments for the proposition that sources of "true law," other than the most literal possible interpretation of the legal text, are *legitimate*. Those arguments can fairly be called moral, historical, and structural.

III. WHAT IT ADDS UP TO: THINKING WHAT WE DO

The short description I have given fails to do justice to what, with a modicum of competence, takes place at trial. (A conservative is always disadvantaged because he must rely on careful description

29. Iris Murdoch put it this way:

> Ignorance, muddle, fear, wishful thinking, lack of tests often make us feel that moral choice is something arbitrary, a matter for personal will rather than for attentive study. . . . The difficulty is to keep the attention fixed upon the real situation and to prevent it from returning surreptitiously to the self with consolations of self-pity, resentment, fantasy, and despair. . . .
>
> [R]ealism, whether of artist or of agent, [i]s a moral achievement.

IRIS MURDOCH, THE SOVEREIGNTY OF GOOD 91, 66 (1970).

This explains the central insight of Kantian ethics: "The more the separateness and differences of other people is realized, and the fact seen that another man has needs and wishes as demanding as one's own, the harder it becomes to treat a person as a thing." *Id.* at 66. My contention is that the devices of the trial seek to occasion by public methods the attention to the details of a particular situation that moral judgment requires.

30. ILL. P.J.I. CIV. 1.01 (2000).

rather than the power of one or two ringing abstractions.) But it is time to move on to the next step, a brief *interpretation* of the significance of what occurs at trial. The decision that the jury makes is a response "to the meaningfulness of the situation in which one is engrossed."[31] It is because the trial is *so* engrossing that the jury's decision is unlikely to be arbitrary, that it responds to "the discipline of the evidence." Now it is time to understand more fully the meaning of the trial event. There is inevitably an ideal or idealizing aspect to this enterprise. I am interpreting an ideal trial, but not *so* ideal that it is beyond the range of human accomplishment. I am interested in *situated ideals*, ideals that are consistently within the range of actual accomplishment. (Those are also the ideals that point the way to possible reforms.)

The trial proceeds, as I said, by the construction and deconstruction of narrative. What is the significance of the centrality of narrative at trial, both the relatively free interpretive narrative of opening statement and the much constrained narrative "in the language of perception" offered on direct examination? Narratives allow the jury to "organize and analyze the vast amounts of information involved in making a legal judgment."[32] "[W]hat does not get structured narratively suffers loss in memory."[33] The trial wisely assumes that narratives are at least a reliable starting point for understanding a human event, "that stories are lived before they are told,"[34] that narrative is congruent in some way with the actual structure of human experience. (It also wisely employs the whole range of devices that we have already examined to correct the possible distortions of free narrative.) Opening statements are necessarily simplifying, and that simplification necessarily involves a judgment of relative importance that actualizes the meaning of the story: "the judgment of importance, by getting rid of the accessory, creates continuity: that which actually took place is disconnected and torn by insignificance, the narrative is meaningful because of its continuity."[35] Good story-telling can

31. Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937, 979 (1990) (internal quotation and citation omitted).

32. W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM 5 (1981).

33. JEROME BRUNER, ACTS OF MEANING 56 (1990).

34. BURNS, *supra* note 11, at 159.

35. Maria Villela Petit, *Thinking History: Methodology and Epistemology in Paul Ricoeur's Reflections on History from* History and Truth to Time and Narrative, *in* THE NARRATIVE PATH 35–36 (T. Peter Kemp & David Rasmussen eds., 1989).

"reveal[] meaning without committing the error of defining it."[36] By allowing lawyers to tell a *relatively*[37] unconstrained story in opening, the law allows more of the full human significance of the past events to enter the courtroom as determined by the moral sensibilities that are implicit in all the practices that structure the life world. It protects against the danger of bureaucratic ossification that always haunts the law.[38] This morality is not the abstract morality of principle, but can include everything necessary to the "complexity of the original moral problem."[39] Narrative is internally related to issues of justice:

> Stories tell us how each one finds or loses his just place in the relation to others in the world. And the communication of the story is confirmed when justice has been recognized. Is there *any* story we tell in which justice is not at issue? It is almost as if we constitute a jury out of our listeners, so that it falls to them to judge the particular view of the case that we present in our story.[40]

Stories are told when there has been a deviation from a traditional pattern and the community needs to understand the event in light of an inventory of common-sense beliefs about the sources of deviance. Otherwise the offense would remain one of an "unbearable sequence of sheer happenings"[41] that would undermine the convictions that make our common life significant. Finally, the form of narrative used in opening statement places the jury *within* the story being told. The story says that there has been a disruption of the just patterns of life in which we all share and that *action* is necessary to restore those patterns. This is, of course, precisely the structure of the commutative justice that is central to legal justice—the restoring

36. HANNAH ARENDT, MEN IN DARK TIMES 105 (1968).

37. "Relatively" unconstrained because it is still constrained by the anticipation of the opponent's case and the discipline of the evidence to follow, supported by the ethical rule prohibiting the lawyer from alluding to any matter of which there will not be admissible evidence. The opening statement has a performative element—it is a promise to produce evidence—and no one wants to be accused of breaking his promise.

38. As Arendt put it:

> No doubt, wherever public life and its law of equality are completely victorious, wherever a civilization succeeds in eliminating to reducing to a minimum the dark background of difference, it will end in complete petrifaction, for having forgotten that man is only the master, not the creator of the world.

HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 302 (1973).

39. Stuart Hampshire, *Public and Private Morality*, *in* PUBLIC AND PRIVATE MORALITY 39 (Stuart Hampshire ed., 1978).

40. Melvyn A. Hill, *The Fictions of Mankind and the Stories of Men*, *in* HANNAH ARENDT, THE RECOVERY OF THE PUBLIC WORLD 290 (Melvyn A. Hill ed., 1979).

41. ARENDT, *supra* note 34, at 104.

of the just balance that characterized the community before its violent disruption.[42]

The battle for the imagination of the jury begins with opening statements. After the openings, the jury will be in a position to answer three questions. The first is, "In what way is it more likely to have happened?" Here jurors are relying on their common sense conceived as a set of common-sense empirical generalizations. The second question the jury will be able to answer is, "Which understanding of these events invokes a more powerful norm?" This will be a moral judgment. The third question is, "What understanding of these events invites us to act in the manner more consistent with our public identity?" In answering this question, the jury is acting "politically" in the manner that de Tocqueville thought distinctive to the American jury.[43]

Even in this preliminary stance, the jury is not reacting solely to "the best story the lawyer can tell" in abstraction from the evidence to come and the legal standards embodied in the law of rules. Each lawyer must anticipate the other side's case. The other attorney can be relied upon to inform the jury of any facts inconsistent with the story he wants to tell. Second, as I mentioned, openings have performative quality as promises to produce admissible and credible evidence, a characteristic enforced by the rules of professional conduct. Third, the law of rules is represented in two ways. Except for the criminal defendant, the parties' factual theory of the case will have to survive a motion for a directed verdict and so must be adequate "as a matter of law." And the evidence that each lawyer will present must pass the test of materiality, the standard for which is set by the rules embedded in the jury instructions. Although lawyers have *relative* freedom to invoke all the dominant moral values of the jury's life world in opening statements, the law and the evidence make their strong impact even here.

So the jury can make preliminary determinations of the relative strength of the cases after opening statements. Structural elements of the theory of the case are weighed: "The inadequate development of setting, character, means or motive, as any literature student knows, render a story's actions ambiguous.... In a trial it is grounds for reasonable doubt."[44] Further, the story is initially tested against the

42. *See* ARISTOTLE, NICOMACHEAN ETHICS, bk. 5.
43. DE TOCQUEVILLE, *supra* note 21, at 293.
44. BENNETT & FELDMAN, *supra* note 32, at 10.

pre-existent common-sense generalizations of the society. These are stored in the community's "web of belief," a set of generalizations that have the form, "Generally and for the most part, . . .[e.g., mothers will promote the interests of their children]."[45] But, thankfully, these common-sense generalizations do not decide the case. Common sense very rarely confronts the level of detailed factual development that the trial provides. Every time one lawyer says, "Generally and for the most part, . . ." the other lawyer is likely to say, "Yes, but not where. . . ." Each new case requires a genuine insight, what Peirce called an "abduction,"[46] that must seek out the intelligibility inherent in these particular facts. The jury also will begin to evaluate the case based on the openings' struggle for the higher moral ground *in the particular circumstances that the details of the narrative reveal.* Placing the facts in a narrative form "is a demand . . . for moral meaning, a demand that sequences of events be assessed as to their significance as elements of a moral drama."[47] "The world of recountable events" *is* an ethical world[48] and "narrative already belongs to the ethical field of its claim—inseparable from narration—to ethical justice."[49] Thus the tentative moral judgment that the jury makes after the openings is based not on a moral *theory* but on "an *ethics already realized*"[50] in the practices and institutions of the society. Finally, the narratives of opening statement require the jury to consider the relationship of the case to their own public identities. In opening, the lawyers are signaling to the jury that their decision in the case will determine the shape of the society for which they are now inevitably responsible. "By his manner of judging, the

45. BERNARD J.F. LONERGAN, S.J., INSIGHT: A STUDY IN HUMAN UNDERSTANDING 173–206 (1957).

46. *See, e.g.*, Thomas A Sebeok & Jean Umiker-Sebeok, *"You Know My Method": A Juxtaposition of Charles S. Peirce and Sherlock Holmes*, *in* THE SIGN OF THREE: DUPIN, HOLMES, PEIRCE 11–54 (Umberto Eco & Thomas A. Sebeok eds., 1983).

47. Hayden White, *The Value of Narrativity in the Representation of Reality*, *in* ON NARRATIVE 1 (W.J.T. Mitchell ed., 1981). White's notion of morality is conservative or Hegelian in that he sees the morality that is invoked in narrative as embedded in social practices and institutions. "[N]arrativity, certainly in factual storytelling and probably in fictional storytelling as well, is intimately related to, if not a function of, the impulse to moralize reality, that is, to identify it with the social system that is the source of any morality that we can imagine." *Id.* at 14.

48. T. Peter Kemp, *Toward a Narrative Ethics: A Bridge Between Ethics and the Narrative Reflection of Ricoeur*, *in* THE NARRATIVE PATH, *supra* note 35, at 65.

49. PAUL RICOEUR, TIME AND NARRATIVE 249 (Kathleen McLaughlin & David Pellauer trans., 1988).

50. Peter Kemp, *Ethics and Narrativity*, *in* THE PHILOSOPHY OF PAUL RICOEUR 371 (Lewis Edwin Hahn ed., 1995).

person discloses to an extent also himself, what kind of person he is, and this disclosure . . . is involuntary."[51] This identity is a public identity:

> Storytelling offers us the means of reconciliation with reality. But, in effect it also makes a common understanding of reality, and so, a world, possible for us in our plurality. . . . Stories tell us how each one finds or loses his just place in relation to others in the world. And the communication of the story is confirmed when justice has been recognized. [52]

This is precisely the place of the jury in American life of which de Tocqueville has given the classic expression:

> The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of right. . . . The jury teaches every man not to recoil before the responsibility of his own actions and impresses him with that manly confidence without which no political virtue can exist. It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society and the part which they take in its government. By obliging men to turn their attention to other affairs than their own, it rubs off that private selfishness which is the rust of society.[53]

The lawyers in a well-tried case, beginning with opening statements, are providing the jury the means by which they can perform an act of interpretation: "What we are interpreting is ourselves, and the past and present social worlds that make us what we are. . . . [W]e already possess a preunderstanding of our historical identity and social relationships. This we get from our past, from the cultural and linguistic traditions that compose our historical identity."[54]

The vast bulk of the trial is consumed not with opening statements, but with the presentation of evidence. I have already described how the presentation of testimony in response to nonleading questions and in the language of perception serves to build the powerful tensions that are at the heart of the trial's genius, as does cross-examination. The evidentiary phase quickly moves the center of gravity at trial away from morally and politically significant stories to the inconvenient details of the facts and the multiplicity of the

51. RONALD BEINER, POLITICAL JUDGMENT 18 (1983).
52. Hill, *supra* note 40, at 289–90.
53. DE TOCQUEVILLE, *supra* note 21, at 284–85.
54. BEINER, *supra* note 51, at 19–20.

perspectives of the witnesses. Paradoxically, by giving particularity and empirical truth their due, the trial provides a strong critique of common-sense generalizations.

> It is only when we are confronted by the demands of action *in context of a particular set of circumstances* that we get a true understanding of what our ends really are, and reassess those ends in relation to a new understanding of our life as a whole. Action in the particular circumstances of life is a continuing dialogue between what we think our life is about, and the particularities of moral and practical exigency.[55]

Jurors come from a world where mass-circulation journalism and sentimental mass-media fiction anesthetize common sense by eliminating most of the tensions between the general norms and the detailed realities of particular cases. One of the reasons why so many jurors value their jury service is that it enables them to experience what their common sense, elevated by the discipline of the evidence, is capable of. The trial provides a self-criticism of the overgeneralized "scripts" within which much of our common sense is stored.

The consciously structured hybrid of languages at trial creates a fair contest among real values where the appropriate balance can only be fought out. A legal system where decision flows easily from the "sort" of case presented is a system where there is relatively little internal tension and, I would suggest, relatively little justice. As in physics, where an infinitely *more* abstract point of view is appropriate, "only by entertaining multiple and mutually limiting points of view, building up a composite picture, can we approach the real richness of the world."[56]

The tension of opposites created by the trial actualizes the largely tacit powers of the jury. As Holmes put it, "many honest and sensible judgments . . . express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions—impressions which may lie beneath consciousness without losing their worth."[57] Or in Judge Weinstein's words:

> The jury's evaluation of the evidence relevant to a material proposition requires a gestalt or synthesis of evidence which seldom needs to be analyzed precisely. Any item of evidence must be interpreted in the context of all the evidence introduced. . . . In giving appropriate, if sometimes unreflective, weight to a specific piece

55. *Id.* at 24 (emphasis added).

56. Richard Rhodes, *The Philosopher Physicist*, N.Y. TIMES, Jan. 26, 1992 (review of ABRAHAM PAIS, NIELS BOHR'S TIMES: IN PHYSICS, PHILOSOPHY, AND POLITY (1991)).

57. Chicago, B. & Q. Ry. Co. v. Babcock, 204 U.S. 585, 598 (1907).

> of evidence the trier will fit it into a shifting mosaic.... [C]onfirming evidence of that other line of proof may require a re-evaluation of the witness' credibility and a complex readjustment of the assessment of all the interlocking evidence.[58]

The jury's cognitive operations at trial are holistic and interpretive. The jury performs an *integration* of all the evidence within the horizon of its own practical responsibilities. It grasps a literally indescribable constellation of facts, norms, and possibilities for action through "the cumulation of probabilities... too fine to avail separately, too subtle and circuitous to be convertible into syllogisms."[59] The jury's consideration is likely

> to trust rather to the multitude and variety of its arguments than to the conclusiveness of any one. Its reasoning should not form a chain which is no stronger than its weakest link, but a cable whose fibers may be ever so slender, provided they are sufficiently numerous and intimately connected.[60]

Jury determinations often have a quality of depth or substance about them. This is true because the trial puts the jury in a position to judge with care and skill. *Why* this is true requires an account of the ways in which the consciously structured hybrid of languages and practices at trial really illuminate what is at stake at trial. Very briefly,[61] the different languages of the trial express modes of understanding that are congruent with quite different norms that find their natural homes in different spheres of social life. They have a *fundamentum in rebus*. And the res are social practices, "forms of life." What is at stake at trial is the relative importance of the norms at play and the relative appropriateness of moral judgment, legal categorization, or public self-constitution to the resolution of the cause. Because we have built a society that, like any decent society, has relatively different spheres constituted by different norms, *somewhere* in our social practices, we must discern what is the most important aspect of this *particular*, *very particular*, case. And we often do it at trial. The unbearable tensions among the "language regions" at trial conform to the great tensions among social practices in the world. The trial does justice and creates the institutional conditions of the

58. United States v. Schipani, 289 F. Supp 43 (E.D.N.Y.), *aff'd*, 414 F.2d 1296 (2d Cir. 1969). For the classic, if somewhat tongue-in-cheek expression of nonformal thinking at trial, see Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 279 (1929).

59. NEWMAN, *supra* note 25, at 288.

60. 5 CHARLES SANDERS PEIRCE, *Some Consequences of Four Incapacities*, *in* COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 5.265 (Charles Hartshorne & Paul Weiss eds., 1958).

61. I have tried to provide a somewhat fuller account in BURNS, *supra* note 11, at 183–244.

possibility of justice's accomplishment.[62] Although its power comes from its conservative quality and the centrality of common-sense moral categories, it performs a distinctively modern function for us, "less to create constantly new forms of life than to creatively renew actual forms by taking advantage of their internal multiplicity and tensions and their friction with one another."[63]

There are philosophical positions that support the view of the jury trial that I have just sketched out. They are very powerful positions and serve, at the theoretical level, as those "fibers ever so slender"[64] to help justify that view. On the cognitive side, philosophers have identified the human intellectual capacities that juries must exercise to respond to the trial's languages and practices. The Kantian tradition speaks of "reflective judgment," the capacity we have to operate without pregiven generalizations. This power is activated by multiplying the standpoints from which a situation can be understood to achieve a kind of generality, but not, however, "the generality of the concept. It is, on the contrary, closely connected with particulars, with the particular conditions of the standpoints one has to go through in order to arrive at one's own general standpoint."[65] This multiplication of perspectives succeeds when "a particular issue is forced into the open that it may show itself from all sides, in every possible perspective, until it is flooded and made transparent by the full light of human comprehension."[66] The multiplicity of trial languages and performance is designed to create the conditions for that kind of illumination. The Aristotelian tradition speaks of "practical wisdom" as relying on a kind of tacit judgment of perceptual identification—our ability to see something "as" it is. Human intelligence can dwell on the tensions of the particular to understand it for what it is beyond the capacity of principles likely to be established ahead of time. This ability so closely parallels the intelligence that trial languages and practices activate, that I must quote at some length:

> We reflect on an incident not by subsuming it under a general rule, not by assimilating its features to the terms of an elegant scientific

62. DAVID LUBAN, LEGAL MODERNISM 380 (1994). The trial thus meets our needs as moderns who know that all of our social institutions are of our own making, and so subject to criticism.

63. DAVID KOLB, THE CRITIQUE OF PURE MODERNITY 259 (1986).

64. PIERCE, *supra* note 60, at 5.264.

65. HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY 44 (1989).

66. HANNAH ARENDT, *Truth and Politics*, *in* BETWEEN PAST AND FUTURE 242 (1977).

> procedure, but by burrowing down into the depths of the particular, finding images and connections that will permit us to see it more truly, describe it more richly; by combining this burrowing with a horizontal drawing of connections, so that every horizontal link contributes to the depth of our view of the particular, and every new depth creates new horizontal links.... The image of learning expressed in this style ... stresses responsiveness and an attention to complexity; it discourages the search for the simple and, above all, for the reductive.... [C]orrect choice (or: good interpretation) is, first and foremost, a matter of keenness and flexibility of perception, rather than conformity to a set of simplifying principles.[67]

Finally, the interpretive or hermeneutical tradition stresses our ability to understand through circular codetermination of particulars and universals, on the one hand, and the details of a particular situation and our projects, on the other hand. Clifford Geertz speaks of "a continuous dialectical tacking between the most local of local detail and the most global of global structures in such a way as to bring both into view simultaneously."[68] The particular situation is understood against a pre-existent common sense, which is both a web of belief and also "a learned way of *acting*—or 'coping' with things and situations—that renders the world meaningful" and this because "the way human beings exist or 'dwell' in the world is fundamentally in a state of practical absorption in tasks and skills."[69] There are thus two circles of the understanding around which the jury moves. The first moves between the individual pieces of evidence and the whole theory and theme of the case. The second moves between the details of the evidence and the jury's practical options. For example, the defendant's actions may be found to be "knowing" depending in part on the risks of releasing him back out into the community.[70] All three of these modes of judging claim a "communal validity." Arendt found in Kant's notion of reflective judgment a

> mode of thinking that is neither to be identified with the expression of private feelings nor to be confused with the type of universality characteristic of 'cognitive reason.' It is a mode of thinking that is capable of dealing with the particular in its particularity but which nevertheless makes the claim to communal validity. When one judges, one judges as a member of a human community.[71]

67. NUSSBAUM, *supra* note 26, at 69.

68. Geertz, *supra* note 3, at 239.

69. Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 YALE L.J. 253, 268, 270 (1996).

70. *See generally* Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85 (2002).

71. RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM 217 (1983).

Likewise, Aristotelian practical wisdom involves a disciplined and careful perception of an individual situation in light of a complex web of public norms.[72] And interpretive understanding involves an integrative understanding of a particular situation in light of shared modes of acting. All three achieve an objectivity rooted in a refined grasp of the relevance of basic norms to a particular situation.

Can the consciously structured hybrid of languages used at trial find the truth? I believe the answer is an emphatic "Yes," though once again such an affirmative answer depends on philosophical commitments, all of which are defensible. First, trial verdicts can be true if narrative is embedded in the nature of human action, that stories are lived before they are told. The narratives of the trial, taken together and criticized ("deconstructed") by the acid of cross-examination and argument, can get close to the real human event. Second, though common sense must rely on common-sense generalizations and determinations of the probable, vigorous advocacy and well-wrought institutions can allow judgments of the probable to converge on the actually true:

> Consider once again how the practices of the trial aid this process. The opening statement is a promise as well as a story: without supporting admissible evidence, it is a broken promise. Lawyers are prohibited from mentioning anything in opening that will not be supported by such evidence. They are constrained in the process of trial preparation both of their own clients and of nonclient witnesses by ethical rules against the creation and presentation of false evidence and by the criminal law against the suborning of perjury. Lawyers are prohibited from suggesting anything in cross-examination that they do not have a good-faith basis to believe is true or (sometimes) admissible evidence to support. Testimony is given under oath. It is subject to cross-examination. Lawyers are permitted to introduce evidence to support their own cases and also to undermine their opponents'. The law of evidence, at least in the hands "of a strong and wise trial judge," serves to exclude both utterly unreliable evidence and the sorts of evidence that serve to dissipate the fruitful tensions of the trial with irrelevancy. So a lawyer cannot just tell the most plausible story, regardless of its truth. To the extent that a theory of the case is rendered initially plausible by a description which relies on the omission of details that ought fairly to be included, the correction will not be long in coming. To the extent that the jury was initially "taken in," then immediately disillusioned, to that extent will the general plausibility of the position be undermined, not only because of the performative offense, but also because of the implicit admission that such a distortion was

72. NUSSBAUM, *supra* note 26, at 69.

> the only way the position could be defended. In short, the ethics of the bar aim at dissuading "puny" disputation, and the devices of the trial are designed to create the likelihood that the better argument and stronger evidence will prevail.[73]

Third, the trial will work to the extent that there is a capacity of the trial to show more than it can tell, and correspondingly, there is a human capacity to grasp a practical truth manifest in the tensions created by the trial's consciously structured hybrid of languages. Trial languages do not simply play off one another, they reveal something, they "actually put us in contact with the sources they tap[s]. They can *realize* the contact."[74] Fourth, the trial will be able to reach the truth of a human situation to the extent that fundamentally interpretive methods can converge on that truth. The trial shows us the meaning of the situation in a way that would be invisible without its methods; yet, once we have experienced the trial, we cannot see the situation other than in the light the trial has shed. Finally, the trial will converge on the human truth of a situation to the extent that there exist no institutions that are better designed to achieve the practical purpose of the trial and those purposes are rooted in the most important human interests. All those propositions are, I believe, more than defensible.

IV. WHAT THE TRIAL DOES FOR US

One of the most demanding contemporary tasks is to refine norms that apply to the basic structure of society, the pattern of rules and practices within which we live our ordinary moral lives. Since the French Revolution, and for Americans, certainly since the New Deal, it has been impossible to maintain that we have not created those rules and practices and, therefore, that we are not responsible for their shape. But we moderns have also inherited modes of thought that place these structures beyond good and evil, beyond moral evaluation. In these modes of thought the basic structure can only be known "scientifically," though the forms this science should take have varied quite significantly. This notion of the amorality of the basic structure of society has led to disaster and is one aspect of what Arendt has called "the onslaught of modernity."[75]

73. BURNS, *supra* note 11, at 229–30 (citations omitted).
74. CHARLES TAYLOR, SOURCES OF THE SELF 512 (1989).
75. HANNAH ARENDT, ON REVOLUTION 196 (1963).

What the trial is for us is a forum within which we can carefully develop the norms that ought to apply to the basic structure of society. We can do this with adequate attention to the details of the individual case. We can do this in a way that respects the differences that exist among the different spheres of human action and the importance of moral judgment, legal formality, and political responsibility. The trial acknowledges that most problematic situations have moral, legal, and political dimensions and creates a forum to do exactly what we need, to make judgments of relative importance of the norms implicit in these spheres. However, it addresses this question of relative importance *only* for the case being tried. The trial makes it possible to do practically what our best thinkers have not been able to do theoretically, to provide for a practical reshaping of our basic structure, only in a careful, case-by-case basis. And so the trial fulfills that particularly modern function without succumbing to the "onslaught of modernity," "less to create constantly new forms of life than to creatively renew actual forms by taking advantage of their internal multiplicity and their friction with one another."[76]

What is true of the trial is also true at the constitutional policy level. Real understanding, once again, requires "a continuous dialectical tacking between the most local of local detail and the most global of global structures in such a way as to bring both into view simultaneously."[77] I have tried to provide an interpretation of the nature of the trial that focuses both on local detail and on the global significance of those details. But I have hardly done all of what needs to be done to identify the true situated ideal that the trial embodies that can, in turn, serve as the standard for further development. The main lines of the situated ideal of the jury trial that I have merely sketched here in contrast to the received view must be justified "by the mutual support of many considerations, of everything fitting together into one coherent view."[78] What else is necessary for "*everything*" to fit together?

V. BROADER CONTEXTS

One thing necessary for everything to fit together is an understanding of the jury trial in relation to other institutions of self-

76. KOLB, *supra* note 63, at 259.
77. Geertz, *supra* note 3, at 239.
78. RAWLS, *supra* note 1, at 579.

government. Nancy Marder has been developing a "process" view of the jury that does just that.[79] She has noted, as have I,[80] that our actual jury practices are inconsistent with what I have called the received view. Even within the law of rules, juries actually engage in broad-based interpretation well beyond what could be described as "fact finding." They regularly determine what is "reasonable" in tort actions and make practical determinations about what constitutes "reasonable doubt" in criminal cases.[81] Marder shows how consistent patterns of jury determinations have been significant in reconstituting what can only be called our "basic structure," "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."[82] "[J]uries, by declining to find contributory negligence, essentially created a regime of comparative negligence long before the legislature and judges had eliminated contributory negligence as a defense."[83] Juries have likewise changed the legal order through patterns of decisions in wrongful discharge cases and the law of product safety. Marder provides an account of the relative strengths that juries have in comparison to courts and legislatures[84] that supplements my account of the ways in which the discipline of the trial elevates their common-sense judgment.

Marder writes in an institutional idiom, justifying the jury's role in a way that a political scientist would appreciate. By contrast, Akhil Reed Amar has argued recently for a central role for the jury based on constitutional history[85] and theory. Amar finds the jury to be the "paradigmatic image underlying the original Bill of Rights."[86] The framers understood it in just the way that de Tocqueville would express in the next generation, as serving a self-consciously political

79. Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 910 (1999).

80. BURNS, *supra* note 11, at 26–33. My account focuses on the procedural rules and practices surrounding the trial.

81. *See* Lillquist, *supra* 70, at 87.

82. RAWLS, *supra* note 1, at 7. Rawls includes as major institutions "the political constitution and the principal economic and social arrangements." *Id.*

83. Marder, *supra* note 79, at 910.

84. *Id.* at 918.

85. Charles Wolfram's classic article on the Seventh Amendment, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973), argues persuasively that the federal civil jury requirement was proposed and adopted under the assumptions that juries would decide cases quite differently than would federal judges and that this difference was to the good.

86. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 96 (1998).

function.[87] This political function is the expression of the sovereignty which remains in the people. Indeed the distinctive feature of Federalist political theory was to place sovereignty in the people, rather than in the legislature, where their teachers, Locke and Blackstone, had placed it.[88] This sovereignty, Amar writes, can be found in rules that prevent "judges from directing verdicts of guilt or requiring special verdicts in criminal cases; barring trial judges from reversing, and appellate courts from reviewing, criminal jury acquittals; allowing criminal defendants to escape government efforts to use collateral estoppel offensively; and preventing challenges to inconsistent criminal jury verdicts."[89] He goes so far as to envision a function of "jury review" of legislation implicit in the Bill of Rights analogous to that established for the federal courts in *Marbury v. Madison*.[90] Although only implicit in the Bill of Rights (the jury did not have its John Marshall, as it turned out!), these notions can also be found in a more pervasive, and more disciplined, way in the very trial practices I have described.

In sum, an understanding of the jury in largely its present form can be defended by a careful description of its languages and practices, by an interpretation of its moral significance for us, by an understanding of the jury's place in the structure of American institutions, by its constitutional history and significance, and by philosophical arguments concerning our need to develop moral norms applying to the basic structure of society.

I want to turn now to the developments that have pushed us to a more crimped understanding of the jury and sketch out in very broad terms the social developments and jurisprudential issues that will determine the place of the jury in our legal order in the coming decades.

VI. THE SOURCES OF PRESSURE ON THE JURY: YESTERDAY AND TODAY

Amar is surprised at the strength of what we can only call strong and, as it turned out, partially unrealized sources for the jury's central role in the Constitution and at "how strikingly powerful the jury

87. *See id.* at 83.

88. GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1789, at 162, 530 (1972).

89. AMAR, *supra* note 86, at 104.

90. *Id.* at 98.

might have become had post-1800 history unfolded differently."[91] We take for granted today a road created by turns that were hardly inevitable. Seventh Amendment jurisprudence was early given a first principle, that the amendment establishes a civil jury right to the extent that it existed in England in 1791, that was far from inevitable and designed to be restrictive.[92] We can hardly remember that motions for directed verdict, judgments notwithstanding the verdict, and summary judgment were once thought to raise profound constitutional problems. It is fairly clear that the current federal jury instruction informing the jury that they are obliged to follow "the law" (that is, the rule in the instruction) whether or not they found it to be morally appropriate for the resolution of this case would not have commanded broad assent in 1800.

The full history of these developments has yet to be written. They are part of a much larger story. Intertwined from the beginning of American government, there have been three understandings of first principles applicable to what I will call constitutional policy. The centrality of the jury has drawn on the first two. The natural rights model finds its immediate source in the Declaration of Independence and has a place in the republican vision and the "higher law background of American constitutional law."[93] It has had its classical theorists and continues to have adherents. The jury trial has been understood as a forum for the discernment of higher law.[94] The republican model found its immediate classical expression in the Antifederalist writings, is prominent in the Bill of Rights, has a powerful institutional expression in the jury trial,[95] and resurfaces at different times and in different legal contexts. It, too, has its theorists. The model of instrumental rationality finds its classical expression in the Federalist writings and finds institutional expression in interest group understandings of legislation, administrative practices that employ cost-benefit analysis, other forms of social-scientific theory as their preferred languages, and in a style of judging, with immediate roots in the New Deal, that sees law as the instrument of "social engineering." (A central American institution, the market, has been justified historically first under a natural rights model, and more

91. *Id.* at 103.

92. *See* Wolfram, *supra* note 85, at 639–42.

93. Edward Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928).

94. On the jury as expressive of "higher law," see ABRAMSON, *supra* note 12, at 57–95.

95. *Id.* at 17–55.

recently has employed the ultimately utilitarian language of efficient resource allocation as its mode of self-justification.)

Historically, the three modes of rationality have often been deployed against one another. The republican vision that was embedded in the jury trial was increasingly limited by judicial action throughout the nineteenth century. There were a number of motives for this limitation beyond the simple class bias of upper-class judges that the Antifederalists consistently warned against. The slavery controversy presented to American law an issue in which the constitutional compromise was discontinuous with the ordinary morality of the Northern half of the Nation. Here was a case where law and common morality diverged. Northern judges whose first allegiance was to law or to the Constitution felt bound to prevent Northern juries from reaching "illegal and unconstitutional" decisions and began to devise doctrinal strategies to take certain issues away from the jury.[96] Next, the period of rapid economic expansion after the Civil War was supported in the judiciary by men who developed procedural doctrines that were designed to support capital concentration and efficiency. They portrayed the "populist" jury as representing only one of several competing social interests and developed a self-understanding that placed the judge as a fair and neutral arbiter among social classes.[97] Paradoxically, they employed natural rights language in this effort and developed a specific concept of the rule of law. New Deal rhetoric attacked constitutional uses of natural law argument, tended toward positivism in legal philosophy, and elevated various forms of instrumental rationality at the appellate level and, most importantly, in the vast system of administrative law and adjudication the New Deal created.[98] Since the 1960s, styles of normative and republican thinking have attacked instrumental rationality and the modes of social ordering intertwined with it, and have sought to supplant the "social engineering" of New Deal jurisprudence.[99] In constitutional interpretation, judges have tried to identify the mutually limiting interrelations of history, functional or instrumental rationality, and fundamental right.

96. *See id.* at 77–82.

97. *Id.* at 88–90.

98. *See* BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 6–22 (1984).

99. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and The Discounting of Human Lives*, 99 COLUM. L. REV. 941 (1999); Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001).

This short sketch forms the background of the kinds of jurisprudential questions the resolution of which will be closely intertwined with the fate of the jury trial in the coming decades. Let me first review the perspective from which the jury trial is likely to be attacked and try to locate the real questions underlying the partisan rhetoric that is critical of the jury.[100]

The centrality of the jury is currently a political issue because of developments during the past fifty years that have, to some small degree, reversed the decline of the jury during the nineteenth and early-twentieth centuries. Seventh Amendment jurisprudence has broadened the availability of the civil jury in the federal courts. Most importantly, a series of Supreme Court decisions and congressional enactments has democratized the American jury so that jurors are

100. As I write this, I am looking at a recent quarter-page ad on the op-ed page of the *New York Times* for December 26, 2002 taken by a group called Common Good, whose mission is "Reforming America's Lawsuit Culture." *Is the Legal System Broken?*, N.Y. TIMES, Dec. 26, 2002, at A35. (The space in the *Times* was donated by ExxonMobil.) It begins with a good statement of the natural rights position (the first sentence) combined with the liberal position (the second sentence): "Law is an essential pillar of freedom because it sets boundaries of right and wrong. With law as a reliable guide, people can make free choices without fearing retribution or abuse." *Id.* The ad goes on to criticize the jury trial for its variability ("standards today are changeable from jury to jury"), leading to a lack of predictability ("[M]any Americans now go through the day looking over their shoulders instead of accomplishing their goals." "Today many Americans feel nervous doing almost anything."). *Id.* The effects of this variability are then argued in the contexts of hospitals and schools, rather than of oil companies. *Id.* Globally, "[l]egal fear has become a defining characteristic of American culture." *Id.* The victims, the ad continues, are common sense and fairness ("Lottery-like verdicts provides riches to a few to the detriment of many, sometimes leaving no funds to compensate true victims."). *Id.* A vast agenda is mapped out:

> Reform is desperately needed but must go much further than capping excessive awards. Reform must restore reliability to law. That requires judges and legislatures to take back the authority, abandoned in the 1960s, to make deliberate judgments of who can sue for what. Otherwise, people don't know here they stand, and fear replaces freedom.

Id.

Ads like this represent the use of the advocacy methods honed by advertising agencies and political consultants for a mass audience. These groups are doing what they do best, using the methods that they know. Money plus oversimplification can work. Although I have heard prominent lawyers who represent defendants in civil cases praise the fairness and care of juries, that is not the perspective generally taken by their clients, whose "marketing boys" certainly know how to run an ad campaign. The ad is certainly right in assuming the fate of the jury will be decided in legislatures and courts. In the interest-group liberal battle-ground of the legislatures, groups, prominently trial lawyers and citizen groups, will have to engage using interest-group political means. In the courts, we can only hope that judges will have developed an appreciation of the trial from their years of practice and remember the constitutional status of the jury trial.

Putting aside politics, what is the message of the ad? It seems that key criticism of the jury trial is that results are unpredictable compared with the decisions that judges might make. This is a legitimate issue, but much more subtle than the ad suggests. *See* Robert P. Burns, *The Lawfulness of the American Trial*, 38 AM. CRIM. L. REV. 205, 235–39 (2001).

now much more likely to be representative, if not of the country, at least of the electorate.[101] It is no accident that opposition to the jury has grown since this last development. I have tried to show how the discipline of the evidence at trial creates an environment in which events are evaluated with an enormously more searching understanding of the facts than occurs in most political debate. I have tried to show as well that the common-law trial is a traditional institution drawing on ordinary morality and common sense. This mode of thought is discontinuous with that at the heart of other major American institutions, the private and public bureaucracies that employ, indeed are constituted, by forms of instrumental rationality. I have tried to argue that basic decency can be preserved only if ordinary moral and common-sense reasoning structures the forum within which forms of instrumental rationality have to justify themselves. That is what Arendt meant when she said that traditional American institutions and practices have saved us from the worst excesses of "the onslaught of modernity."[102] I do not think that American juries are so naïve that they do not understand the importance of thinking instrumentally in technological and even in economic contexts. Corporate cost-benefit decisions and utilitarian reasoning in creating criminal penalties can be justified in the language of ordinary morality after a searching factual review of the particular case. But it is central for us that we have a forum that consistently and carefully requires that kind of justification.

There is a very subtle and, I think, reciprocal relationship between dominant intellectual or philosophical positions and institutional developments. Because my academic background is in philosophy, I tend to think of questions of institutional design as philosophical questions. But which view will come to be "dominant" is the result of whose arguments are "better" in all kinds of fora—newspapers, political party caucuses, legislatures, courts, TV ad wars—some of which are quite far from ideal speech situations. The better argument need not prevail. Nonetheless, let me try to identify the philosophical or jurisprudential questions with which the future of the jury trial is intertwined. Space will allow me to do little more than identify the questions.

At the highest level of generality, there is the question of the characteristics of fora within which issues about the basic structure of

101. *See* ABRAMSON, *supra* note 12, at 115–31.
102. ARENDT, *supra* note 75, at 196.

society are considered. I have argued that the trial does this in an enormously subtle and rich way. But there is an alternative position. One version would urge that there exists, in one way or another, a "science of society" or, at least, "sciences of society" that exhaust the social field. We cannot know the basic structure of society using ordinary morality and common sense, but only "scientifically." This science should be applied to resolving individual cases in the same way that natural science is applied to solving technical questions. Only those trained in the science can understand the arguments and make reliable judgments. A lay jury cannot. Further, the jury trial itself is an intense encounter with the facts of a particular situation, understood, inevitably, in common-sense moral terms and, however refined by the devices of the trial, those are not appropriate for the resolution of the questions about the basic structure of society that are implicated in so many cases. ("Would you want a jury to set the federal funds discount rate?") This perspective would suggest that the kind of society into which we are moving will inevitably (and therefore "should") be administered by experts applying scientific, sometimes social scientific, knowledge bureaucratically.[103] The jury trial could fall victim to our glacial movement toward an imperial-bureaucratic style of government.

This kind of bureaucratic state would make most of its decisions through what our legal system calls "informal agency action." For historical reasons, of course, cases will still find their way into court.[104] If such cases find their way to court, they should be adjudicated "formalistically." (The relationship between formalism and bureaucracy is another area the history of which has not yet fully been written.) The "scientific" principles that are embedded in a science of society can partially be written into detailed rules that will allow the judge to operate much like a bureaucrat. That is, he will not be distracted by the moral significance of the particular events before him. Indeed, he will be attracted by summary proceedings and

103. Weber was shocked by precisely this vision of modernity: "numbing bureaucracy administering a society regulated only by considerations of performance and efficiency, the domination of capital, and the conversion of all human relations and culture into commodities, a world of enforced conformity and superficial variety." KOLB, *supra* note 63, at 258.

104. There is a long history of argument, fought out in legal doctrine, about which kinds of issues can be addressed administratively, either through informal action or agency adjudication, and which must be adjudicated in a civil court and, if the latter, by jury trial. Both the natural rights and the republican traditions are in play in this argument as a limitation on instrumental rationality. *See, e.g.*, Atlas Roofing Co., Inc. v. OSHA, 430 U.S. 442 (1977); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1936).

demand rules of materiality that keep him focused on the principle, discontinuous with ordinary morality, that will decide the case and so reconstitute the basic structure.

To the extent that we come to put our faith in a science of society, or various sciences that exhaust the social field, the jury trial will continue to be diminished as a public institution. A major issue for judges and legislators, and also for theorists, is to discern the range of decisions that we give over to technical and bureaucratic decision making, as opposed to the more traditional form of evaluation that occurs at trial. Much of what American corporations say in their ad campaigns against the trial is a polemical contribution to this debate on the side of instrumental thinking.

There is a another perspective that does not pitch its tent with "scientific" thinking, at least not in the Anglo-American usage of that term, but embraces the conviction that there is a mode of thinking about the basic structure of society that is superior, at least in some contexts, to the highly contextual reasoning that occurs in the jury trial. The doctrine of "constitutional facts,"[105] it seems to me, reflects that view. This perspective suggests that in some contexts, prominently the First Amendment context, the legal significance of the resolution of the particular case as setting a clear standard to be applied for action in the future, its "political" significance, if you will, is of greater importance than the highly contextual resolution of the particular case. And, more importantly, judges, perhaps especially appellate judges, and especially Supreme Court justices, are in a better position to make that judgment than will be the individual jury. This position, which seems generally plausible, assumes there is a kind of knowledge of the legal order as a whole that comes from long and reflective experience within it, a statesman's knowledge. Even though the discipline of the evidence at trial actualizes a common sense that is not "plebiscitory," not the least common denominator of lay understanding, it may not fully reflect all the knowledge that a legal statesman has.

Judges will continue to work out the areas in which this perspective is persuasive. In the civil context, it will arise in cases concerning the appropriateness of summary judgment and the extent of appellate review of questions of fact. Of course, they are highly interested parties in this inquiry. But because there is a rich tradition of honor-

105. *See, e.g.*, Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984).

ing the passive virtues among the judiciary, of appreciating the limits of their own competency and authority, we can hope that the jury will continue to be a vital institution.

There is a third inquiry the results of which will be closely related to the range of issues we commit to jury decision making in the future. It is closely related to the inquiry concerning the appropriate extent of bureaucratic social ordering. It begins with two assertions. Jury decision making was appropriate, often in the name of higher law, at a time when (1) there was a high level of moral consensus in the society and (2) written law could plausibly be understood as an expression of that moral consensus, not as an expression of technical judgment. That era is over. Those assertions raise a number of questions. On a factual level, there are questions concerning the representativeness of juries and the extent to which people arrive at the same judgment from different perspectives.[106] On the theoretical level, they raise questions about the extent to which common sense and ordinary morality are relevant to "what the law is" in different social fields. It seems to me that the actual characteristics of jury decision making throw considerable light on the basic philosophical questions about the relationships among law, morality, and politics that are at play in this inquiry. Our understanding of "what is or is not law" will undoubtedly affect our understanding of the legitimacy of jury verdicts in the future.[107] I hope the opposite development occurs as well, that our understanding of what law is continues to be enriched by a nuanced understanding of jury decision making. The polemics surrounding the jury trial and the higher comfort level most legal philosophers have with appellate opinions rather than jury trials slow this process down considerably.

In considering these questions, I hope that we remember that the trial as we have it *already* provides an important place for the law of rules and the interests of stability, predictability, and consequent autonomy that it expresses. I will not rehearse all of the ways in which that is true. The trial allows the jury to say something other than stability and predictability are the most important features of *this case*, but legal rules in many ways decide which cases go to trial and structure the cases that juries see. The rule of law is an important element in American public identity and there is every reason to

106. Only a very small percentage of juries hang. This is especially true for civil juries.

107. *See* Burns, *supra* note 100, at 223–30.

believe that juries take that ideal very seriously.[108] And, of course, in a democratic society it is unlikely that a gap between the law of rules and the judgment of a cross-sectional jury will be very wide or last too long. But even when such a gap exists, the value of conforming to the written law is certainly one that juries appreciate.

I have posed these issues as questions, as if their resolution will dictate the future of the jury trial. But the jury trial is a real institution around which real interests rotate. It is possible that these interests have a dynamic that will diminish its importance. In particular, an increased bureaucratization of American life and an increased power of the "systems world" over that life would likely dictate a reduced place for the mode of case resolution that is largely incompatible with the instrumental rationality of bureaucratic entities, especially as that instrumentalism reaches out to control the political and administrative process. Again, an imperial-bureaucratic style may be gaining momentum. These are powerful dynamics, but not outside our political and legal control.

VII. REFORM

For an institutional conservative like myself, the question of reform is delicate. This is especially true with regard to an institution, the jury trial, whose strength is rooted in a way in which opposing values are placed in powerful tensions. Those tensions make it the crucible of democracy. I have spent so much space describing the jury trial because I agree with that old conservative, Dr. Johnson, who said that people need to be reminded more often than they need to be instructed.[109] I am not in the same position as the defenders of the received view, who have a simpler notion of the trial that can serve as a goal to which reforms may be related instrumentally. Nonetheless, since part of my topic is the future of the jury trial, I suppose I should venture a few possibilities in fairly summary form. It seems to me that they would move in the direction of increasing the quality of deliberation at trial and so increasing the level of public confidence in

108. The classic finding is that judges said they agree with juries in about 80% of cases. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 56 (1966). Since judges were asked how they "would have" decided the case while the jury was deliberating and so knew that they did not bear the actual responsibility for the decision of the case, it is likely that Kalven and Zeisel underestimated the extent of judge-jury agreement. *See id.* at 45. And, of course, there is the question of the propriety of using the judge's determination as the proxy for "the law."

109. JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON (W. J. Bate ed., Random House 1952)

the trial.[110] I have six suggestions largely with regard to the institutional context within which juries function.

First, the trend to admissibility in the law of evidence should continue.[111] Because most evidence has *some* probative value and the jury's decision is one that integrates all the evidence, we should rely primarily on the critical devices of the trial to enable the jury to properly evaluate the evidence. Only when those devices are, for one reason or another, inadequate, should we consider exclusion. In particular, razor's edge binary decisions by the judge as to the admissibility of important evidence based on whether the proponent has satisfied a foundational requirement by a preponderance of the evidence should be disfavored. As one of our most important evidence scholars, who is also a trial court judge of great experience, put it:

> Excluding information on the ground that jurors are too ignorant or emotional to evaluate it properly may have been appropriate in England at a time when a rigid class society created a wide gap between royal judges and commoner jurors, but it is inconsistent with the realities of our modern American informed society and the responsibilities of independent thought in a working society.[112]

The goal of evidence law should be to maintain the productive tensions that prevail in the trial court. I understand that this is not a cookbook formula for deciding what evidence serves only to dissipate those tensions, but I think that some such regulative ideal actually informs much of the best of the current "discretionary controls in the hands of a wise and strong trial court."[113] Concessions to the shortness of life and to the inability of some lawyers to present a coherent case should be exercised through methods that do not require the micromanaging of evidence, such as reasonable time limitations for the presentation of evidence.

Second, too much trial by ambush still prevails in the criminal trial. The almost universal absence of some deposition practice in serious criminal cases invites false convictions. The use of hearings on motions to suppress to eke out a bit of discovery in the face of

110. One factor that weakens the trial stems from the market system "within" which it is embedded. Namely, the unequal distribution of legal resources can be every bit as important as are features of the trial itself.

111. *See* Robert P. Burns, *Notes on the Future of Evidence Law*, 74 TEMP. L. REV. 69 (2001).

112. United States v. Shonubi, 895 F. Supp. 460, 493 (E.D.N.Y. 1995) (Weinstein, J.) (quoting 1 MARGARET A. BERGER ET AL., PREFACE TO EVIDENCE iii (1994)); *see* Peter W. Murphy, *Some Reflections on Evidence and Proof*, 40 S. TEX. L. REV. 327 (1999).

113. Michelson v. United States, 335 U.S. 469, 485–86 (1948).

generally sustained objections is a very poor substitute for real discovery and serves to corrupt the process.

Third, the limitations on discovery for the criminal defendant are often justified as providing a rough balance to offset the strategic advantage of the defendant's privilege against self-incrimination. The constitutional structure of privilege law should be rethought with a more concrete imagination. More focus must be placed on the situation of the truly innocent. The absence of actual protection at the police station combined with overblown and ritualistic protection at trial is likely to benefit the guilty and disfavor the innocent.[114]

Fourth, we have to address problems surrounding systematic perjury. It is a blight on the trial system, one that leads in criminal cases to false convictions and false acquittals. This is a difficult matter, and one that rules may have limited power to correct. Trials would be better if lawyers were more serious about "confronting" their clients and witnesses on potential testimony.

Fifth, in the civil context the percentage of litigation time spent in discovery disputes and in summary judgment practice[115] should decline. The industry that is built around those enterprises should be downsized.[116] This will take continued changes in the Rules of Civil Procedure, the Rules of Professional Conduct, and the economics of law practice. An attempt to mediate most civil cases should occur only after crucial discovery is complete. If it is unsuccessful, most cases should proceed to an early trial.

Sixth, juries should be aware of the consequences of their decisions. Substantive law should provide "remedies" that take account of the fluidity and ambiguity of life. This is less a problem in civil cases where juries determine money damages. In criminal cases enormous sentencing differentials, from probation to death, can depend on determination about "facts" concerning mental states that are written on water. A greater continuum of possible penalties in the jury's hands is likely to produce fairer outcomes.

With regard to the trial itself, I would endorse the suggestions recently made by Jeffrey Abramson.[117] Abramson recommends that the

114. *See* MARVIN E. FRANKEL, PARTISAN JUSTICE (1978).

115. *See* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 192–93 (1988).

116. *See* George B. Shepherd & Morgan Cloud, *Time and Money: Discovery Leads to Hourly Billing*, 1999 U. ILL. L. REV. 91, 112.

117. ABRAMSON, *supra* note 12, at 247–50.

unanimous verdict should be reinstated, the peremptory challenge should be eliminated, that juries be instructed that they have the authority to set aside the written law to acquit a defendant, that the practice end of routinely disqualifying potential jurors because of exposure to the standard kinds of pretrial publicity, and that citizens not be so easily able to escape their jury obligations.[118] The unanimity requirement will improve deliberation at the cost of a few more hung juries. The elimination of the peremptory challenge would reduce the uncertainties, some of them corrupting, surrounding the courts' attempts to enforce *Batson*[119] and its progeny. Eliminating peremptories should be accompanied by a more serious reconsideration of what constitutes "cause" for excluding a juror. Because of the availability of peremptories, many judges have stopped granting all but the most obvious motions to strike jurors for cause. The spectacle of jury selection that takes as long as the trial itself should end. Nullification is rarely employed, but is alive and well. The instruction that juries have the authority to be "judges of the law" in criminal cases could be accompanied by instructions that they are to exercise this authority cautiously. "One day or one trial" systems that are currently used in many places will be strengthened by elimination of peremptories. It will increase the likelihood that citizens who appear for jury duty will actually serve, and reduce the need to assemble citizens who are then sent home.

Although I am not at all sure anything will come of it, I would like to see a sustained attempt by social psychologists and other social scientists to identify those systematic failures in human cognitive capacities in which there is the highest level of certainty in the scientific community and which pose special dangers of distorting jury reasoning. As the above shows, I am a strong defender of the power of the jury's common sense, when disciplined by the trial's devices. However, we already instruct jurors about what is fair to consider in weighing evidence. Jurors are, for example, told they should consider a witness's interests, demeanor, and any prior inconsistent statements a witness has made in assessing credibility. They are told about the significance they may or should attach to a witness's failure to produce evidence within his or her control. As with the exclusionary rules of the law of evidence, there is precious little empirical evidence to support these instructions about how to consider evidence. I can

118. *Id.*

119. Batson v. Kentucky, 476 U.S. 79 (1986).

imagine a day when judges provide jurors instructions identifying the circumstances under which we know that eyewitness identifications or confessions are especially likely to be unreliable. I understand that this is a delicate enterprise, but it has some chance of helping jury deliberations.

CONCLUSION

The American jury trial, as it currently exists, is one of the greatest achievements of our public culture. It is surrounded by rules and practices that elevate the jury's common sense. It is the crucible of democracy, one of our most important defenses against the onslaught of modernity. Its power stems from the sharp tension of opposites from which it is built up. A decent regard for our own traditions suggests that we consider seriously the profoundly conservative words of the Supreme Court in *Michelson v. United States*: "To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than establish a rational edifice."[120] And, of course, those words apply to my own modest suggestions for what may or may not prove to be "reform."

120. 335 U.S. 469, 485–86 (1948). The Court was discussing evidence law, which was then more grotesque than it is now, and much more grotesque than the structure of the trial as a whole.